United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 13, 2004

S.A.M.
TO : Rodney Johnson, Regional Director
Region 15

FROM : Barry J. Kearney, Associate General Counsel
Divison of Advice

SUBJECT: Global Industries Offshore, LLC and C&G Welding, Inc.
Case 15-CA-17046

122-3300
133-3000
220-5014
220-7567-4200

This Section 8(a)(1) and (3) cae was submitted for advice as to (1) whether the Board should assert jurisdiction over conduct involving American welders working in the Gulf of Mexico aboard a foreign-flagged vessel owned by an American company, thereby enabling the Region to issue complaint about certain alleged unfair labor practices committed on the vessel; and (2) whether the welders on board the vessel engaged in a mutiny when they went on strike.

We conclude that the Board should not assert jurisdiction over the labor dispute on the ship because, as in cases in which the Supreme Court found Board jurisdiction over activities on foreign-flag ships inappropriate, to do so here would necessitate inquiry into the "internal discipline and order" of a foreign-flag vessel. In light of this conclusion, we need not decide whether the work stoppage on the ship was in violation of the maritime mutiny statutes or protected under Section 7.

FACTS

Global Industries, Ltd. (Global) is a Louisiana corporation with a facility in Carlysle, Louisiana. Global provides offshore construction and support services including pipeline construction, platform installation and removal, and diving services to the oil and gas industry in the Gulf of Mexico, West Africa, Asia Pacific, the Middle East, India, South America, and Mexico's Bay of Campeche. The work involved herein consisted of laying pipe across the Gulf of Mexico from the *DB Hercules*. Specifically, it involved welding 60-foot lengths of pipe and laying them on the ocean floor about 90-100 miles from the coast of the United States but outside of its territorial waters. Global contracted with C&G Welding, Inc. (C&G) to obtain welders to perform the work. C&G, a Louisiana corporation with an office in Houma, Louisiana, provides contract labor to various companies (primarily offshore companies and

shipyards). The welders on the instant pipeline project were hired by C&G specifically for this job with Global. The Region has concluded that Global and C&G are joint employers of the welders.[1]

The *Hercules* is a pipe-lay derrick barge[2] owned by Global. Built in the Netherlands, the *Hercules* has always been registered under the laws of Vanuatu[3] and flown that country's flag. There is no evidence that it has ever visited a Vanuatu port and, for the job in issue, the *Hercules* left from and returned to Global's facility in Carlysle, Louisiana. During the relevant period, the *Hercules* carried no Vanuatu citizens and was manned almost exclusively by U.S. citizens.[4] All of the welders were U.S. citizens.

On Tuesday, June 17, 2003, the welders on the *Hercules* gave the captain a letter complaining about the terms and conditions of their employment, including poor wages, benefits, living conditions and jobsite safety, and requesting that Global recognize Pipeliners Local Union 798 (the Union) as their bargaining representative. The letter urged Global to resolve those matters with the Union and stated that "if steps are not taken to address these issues with our union representatives by Thursday, noon shift change, we will strike." The captain told the welders that he would try to speak to C&G and get them more money, and said that "they" were trying to address the safety issues, but that the living conditions would stay as they were. The welders worked as usual while awaiting a response to their complaints.

Meanwhile, at least 12 of the welders who eventually went on strike began wearing stickers stating "Local 798, Tulsa, OK" and pins stating "Union Yes." At about 3:45 a.m., June 18, Global welding foreman [*FOIA Exemptions 6 and 7(c)*] told employees that "if it was up to [him], [he] would

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[1] Global and C&G are herein referred to collectively as "the Employer."

[2] It is not a self-propelled vessel.

[3] Vanuatu is a group of 83 islands in the South West Pacific, northeast of New Caledonia and northwest of Fiji, governed as an independent republic by its indigenous people.

[4] Of the over 200 employees on the vessel, only 4 seamen were foreign nationals, including three from Mexico and one from Ireland.

run every son-of-a-bitch that had a button on off the barge." That same day, Union representative Chris North informed one of the welders that C&G had called some people (who happened to be members of the Union) to replace the welders, and that C&G had questioned the applicants as to whether they were union and told them that they would not be hired because they were union. Later that day, one of the welders gave the captain a second letter, which stated that because Global had not agreed to meet with their representative "concerning the unfair labor practices that have been committed in response to the legal protected concerted activity," the welders were going on strike commencing at 6 p.m. that day (June 18).[5]

At about 6:15 p.m., those welders who were working their shift left the worksite and went downstairs to the living quarters, where six or seven Global managers announced that all strikers would have to leave the barge. The Global managers asked the striking employees to pack their belongings and wait in the TV room until a boat came to pick them up. The strikers complied and waited until they left about three hours later. Of the 26 welders, all but six went on strike.

On June 27, the strikers gave Global a letter, signed by one of the welders on behalf of all of the striking employees, making an unconditional offer to return to work. Global refused to reinstate the welders because they had committed mutiny by striking. C&G did not offer them reinstatement either with Global or with any other customer. C&G contends that the strike was illegal against it, as the strike was actually against Global and there was no labor dispute between C&G and the striking employees.

The Union filed the instant charge against the Employer alleging, as relevant here, that it threatened to discharge employees due to their Union membership and/or activities, and refused to reinstate the strikers for engaging in an unfair labor practice strike and/or because of their Union activities.[6]

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[5] The Union contends that the unfair labor practices referenced in the letter involved the unlawful interrogation and threatening of replacement employees, as well as the statement made by one of the welding foremen that if it were up to him, he would put the employees wearing union buttons on a boat and send them back to shore.

[6] The Region has decided to issue complaint, absent settlement, on other charge allegations which involved the following Employer conduct occurring within U.S. territory: interrogating employees and/or applicants concerning their

During the Region's investigation, at the prompting of Global, the Vanuatu Deputy Commissioner of Maritime Affairs wrote a letter to the Region regarding the strike. The letter states that the welders had engaged in an "illegal strike," and that the provisions of the Vanuatu Maritime Act apply to "all Vanuatu flag vessels" (emphasis in letter) regardless of the citizenship of the crewmembers, the owner of the vessel, or whether the vessel calls at U.S. ports. The Vanuatu Maritime Act states, in part:

> STRIKES, PICKETING AND LIKE INTERFERENCE §149.(1)
> It shall be unlawful for any person or labour organization to promote or engage in any strike or picketing, or any boycott or like interference with the internal order or operation of a vessel, unless:
> (a) a majority of seamen on the vessel involved have voted by secret ballot that such action be taken; and
> (b) at least thirty days written notice of intention to take such action has been given to the Employer or the Master; and
> (c) the procedures of conciliation, mediation, and arbitration under section 150 have been followed to conclusion.
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> APPLICATION §99.(1)
> The rights and obligations of every person employed on any ocean going vessel registered under this Act and any persons employing such person shall, with respect to terms and conditions of employment and other matters relating to employment and the internal order of such vessel, be governed by this Chapter.

Global's position. Global contends that the NLRA is inapplicable to foreign-flagged vessels. It argues that the laws of Vanuatu are controlling as to the failure to reinstate the strikers and that the strike was clearly unlawful under Vanuatu law. Global notes that the *Hercules* was registered in Vanuatu when Global purchased it, and that the ship is not eligible to carry an American flag because it was built in a foreign shipyard. Global acknowledges that it does not operate in Vanuatu or its waters, but notes

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Union membership and/or activities; refusing to hire two people because of their Union membership and/or activities; and informing employees that the job applicants' Union membership and/or activities was the reason for their not being hired.

that it is not required to do so in order to be registered under Vanuatu's laws. Global states that it in fact complies with Vanuatu's laws and regulations regarding the operation of the vessel, including those requiring yearly inspections to ensure adherence to Vanuatu's safety and structural guidelines and requiring that a minimum number of a vessel's crew obtain Vanuatu licenses. Global also contends that the welders' strike was mutinous; that various "mutinous acts" of sabotage jeopardized the safety of the vessel and crew; and that since the strike left it with only six welders, it was forced to use a time-consuming emergency welding procedure for three or four days in order to continue the voyage.

Charging Party's Position. The Union submitted no position statement on the jurisdictional issue. As to the alleged mutiny, it contends that the strikers did not refuse any direct orders from the captain or anyone else from Global, and that they left the vessel when asked. It states that none of the welders was engaged in the operation, sailing or safety of the vessel, and that none of them tried to wrest that authority from anyone.

ACTION

We conclude that the Board should not assert jurisdiction over the conduct on the ship because, as in cases in which the Supreme Court found Board jurisdiction over activities on foreign-flag ships inappropriate, to do so in this case would necessitate inquiry into the "internal discipline and order" of a foreign-flag vessel. In light of this conclusion, we need not decide whether the work stoppage was in violation of the maritime mutiny statutes and was therefore unprotected under Section 7, and conclude that the failure to reinstate allegation must be dismissed, absent withdrawal.[7]

As discussed more fully below, the Supreme Court has consistently held that the assertion of Board jurisdiction over activities on or concerning a foreign-flag vessel is inappropriate where the Board's inquiry would involve matters likely to interfere with the "internal discipline and order" of the vessel.[7] The Court has held that

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[7] Given the impropriety of asserting jurisdiction, the Section 8(a)(1) charge allegation involving the foreman's threat of discharge of welders engaged in Union activity must also be dismissed, absent withdrawal.

[7] See, e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

jurisdiction over activities involving foreign-flag vessels is appropriate where the activities are such that the Board's consideration of the dispute would not actually interfere with the internal affairs of the ship.[8]

In denying Board jurisdiction over actions involving a foreign-flag vessel in Benz v. Compania Naviera Hidalgo, the Supreme Court found that the LMRA does not apply to a controversy involving damages resulting from the picketing of a foreign-flag ship operated by foreign seamen under foreign shipping articles while the vessel was temporarily in an American port.[9] It concluded that Congress did not clearly intend the Act to resolve labor disputes between nationals of other countries operating ships under foreign laws.[10]

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[8] See Longshoremen Local 1416 v. Ariadne Shipping Co., 397 U.S. 195 (1970).

[9] 353 U.S. 138, 138-139 (1957).

[10] Id. at 144.

We note that courts have applied a similar statutory construction analysis in finding other domestic statutes inapplicable to foreign-flag ships. See, e.g., Spector, et al. v. Norwegian Cruise Line, Ltd., 356 F.3d 641 (2004) (Title III of the Americans with Disabilities Act does not apply to foreign-flagged vessels because there is no indication that Congress intended it to apply to foreign-flagged vessels). See also EEOC v. Arabian American Oil Co., 499 U.S. 244, 247 (1991) ("ARAMCO"), where the Court held that Title VII did not apply "extraterritorially to regulate the employment practices of United States employers who employ United States' citizens abroad." The Court stated that "[i]t is a longstanding principle of American law that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Id. at 248. As the Spector court noted, Congress did respond to ARAMCO by amending Title VII specifically to cover American citizens working overseas in certain circumstances. 356 F.3d at 646.

In contrast, courts have found that Congress intended that jurisdiction under the Jones Act apply to foreign-flag ships in certain circumstances. See, for example, Lauritzen v. Larsen, 345 U.S. 571 (1953), where the Supreme Court noted that the "all-encompassing" language of the Jones Act, whose literal interpretation would apply to seamen injured everywhere in the world, presented a problem of statutory interpretation of deciding whether Congress intended the

In McCulloch v. Sociedad Nacional de Marineros de Honduras, the Supreme Court held that the jurisdictional provisions of the NLRA do not extend to maritime operations of foreign-flag ships employing alien seamen, even where the foreign owner is a wholly owned subsidiary of a U.S. corporation.[11] The Court rejected the Board's "balancing of contacts" approach for determining whether jurisdiction is appropriate because it "might require the Board to inquire into the internal discipline and order of all foreign vessels calling at American ports."[12] Such activity, it noted, would "raise considerable disturbance not only in the field of maritime law but in our international relations."[13] Finding (as it had in Benz) no specific evidence of

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Jones Act to be applied to foreign events or transactions. It concluded that:

> Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law. Id. at 927-928.

We note that although Lauritzen was decided prior to McCulloch, courts have continued to apply the Lauritzen choice-of-law analysis since then. See, e.g., Hellenic Lines Limited v. Rhoditis, 398 U.S. 306 (1970).

[11] 372 U.S. at 13.

[12] Id. at 19. As noted by the Court (id. at 17), the Board had developed a test relying on the relative weight of a ship's foreign as compared with its American contacts. See, e.g., West India Fruit and Steamship Co., 130 NLRB 343, 354 (1961).

[13] Id. The Court stated that its conclusion did not foreclose a balancing of contacts procedure "in different contexts, such as the Jones Act, 46 U.S.C. § 688, where the pervasive regulation of the internal order of a ship may not be present. As regards application of the Jones Act to maritime torts on foreign ships, however, the Court has stated that '(p)erhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag'." Id. at 19, n.9 (citations omitted).

Congressional intent to include foreign-flag vessels within the Act's coverage, the Court in McCulloch declined to construe the Act as applying to the "internal management and affairs" of the vessels in that case, which were under the Honduran flag. The Court cited the "well-established rule that the law of the flag state ordinarily governs the internal affairs of a ship," and noted that the risk of "international discord" was increased in that case because the assertion of jurisdiction would involve the actual concurrent application of the Act and the Honduran Labor Code.[14]

In Incres Steamship Co.,[15] the issue was whether the Board could adjudicate the legality of the efforts of a union to organize the members of a foreign crew. The Supreme Court noted that Board consideration of the legality of such efforts would require it to examine the relations between the crew and its foreign-flag employer, and therefore held that maritime operations of foreign-flag ships employing alien seamen are not "in commerce" within the meaning of Section 2(6) of the Act.[16]

In contrast, in Longshoremen Local 1416 v. Ariadne Shipping Co.,[17] the Supreme Court held that the Act applied to a union's picketing of foreign-flag ships over wages being paid to American longshoremen unloading the foreign vessels in an American port. The Court determined that the consideration underlying the construction of the statute in Benz, McCulloch, and Incres was inapplicable because that rationale addressed situations in which Board regulation of the labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel, whereas in Ariadne the longshoremen were not involved in the ships' internal affairs, which on a foreign-flag vessel are traditionally governed by foreign law.[18] It

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[14] Id. at 21.

[15] 372 U.S. 24 (1963).

[16] Id. at 27. See also Windward Shipping (London) Ltd. V. American Radio Assn., 415 U.S. 104, 112-115 (1974) (picketing of two foreign-flag vessels by American maritime unions to protest alleged competitive advantage enjoyed by foreign-flag vessels because of substandard wages paid to foreign seamen was not activity "affecting commerce," since the picketing would have materially affected the foreign ships' maritime operations).

[17] 397 U.S. at 196.

[18] Id. at 199.

also noted that the dispute centered on the wages to be paid American residents who were hired to work exclusively on American docks as longshoremen. Accordingly, it concluded that application of the Act to the dispute "would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law."[19]

In our view, there is no exception to the rule that jurisdiction is inappropriate wherever it would involve the internal discipline and order of any vessel carrying a foreign flag for cases involving American employees of an American employer. Two circuits that have spoken to this issue have similarly interpreted McCulloch as applying to all maritime operations of any foreign-flag vessel. In a recent Fifth Circuit decision, Spector, et al. v. Norwegian Cruise Line, Ltd., holding that Title III of the Americans with Disabilities Act does not apply to foreign-flagged vessels, the court described McCulloch as holding that "the NLRA d[oes] not apply to foreign-flagged ships."[20] In Brooks v. Hess Oil V.I. Corp.,[21] the Third Circuit held that the FLSA did not apply to a dispute over wages to be paid to seamen working on Liberian vessels, stating:

> Although the parties concede that there is Supreme Court authority for the proposition that when a United States court exercises its jurisdiction over a foreign flag vessel in civil matters the law of the flag controls (citations to Windward Shipping and McCulloch omitted), plaintiffs assert that this rule should be softened where, as here, the court is dealing with an American employer, American seamen, American waters, and an American union and collective bargaining agreement. We see no logical reason to conclude that at some arbitrary point the number of American contacts outweighs the rule that the law of the flag controls the internal order and economy of foreign flag vessels...." Id. at 208, n.2.

Thus the Third Circuit apparently agrees with the Fifth Circuit's broad reading of McCulloch, i.e., that it was not limited to foreign-flag ships with foreign employers and

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[19] Id. at 199-200.

[20] Spector, supra, 356 F.3d at 645.

[21] 809 F.2d 206, 208 n.2 (3d Cir. 1987).

foreign seamen, but rather that it applies to all maritime operations of foreign-flag vessels.

Consistent with the Supreme Court cases discussed above, the Board has declined to assert jurisdiction over any dispute where to do so would interfere with the "internal discipline and order" of a foreign-flag vessel. In National Maritime Union of America,[22] a union representing U.S. seamen picketed a U.S.S.R. flagged ship with signs protesting the use of U.S.S.R. vessels, instead of U.S. ships, to transport foreign cargo purchased with U.S. tax dollars in violation of the Cargo Preference Act.[23] The union's conduct was alleged to have violated Section 8(b)(4)(i) and (ii)(B) of the Act. In finding no violation, the Board adopted the ALJ's reasoning that because the picketing was aimed at replacing the foreign ship and its foreign crew with a U.S. ship and U.S. crew, the picketing necessarily affected the maritime operations of the foreign ship and consequently could not be "in commerce" within the meaning of the LMRA.[24]

Similarly, in Kingcome Navigation Company,[25] the Board declined jurisdiction over a dispute involving foreign flag vessels with foreign crews periodically entering U.S. waterways. The employer was a Canadian corporation that owned and operated two foreign flag vessels. The dispute involved the assignment of the work of loading logs from the water onto the employer's vessels, all of which was done by crewmembers operating cranes on board the vessels. The Board found that, as in National Maritime Union, the picketing was aimed at replacing foreign personnel on a foreign ship with U.S. personnel. It held that the picketing by the Union "necessarily interferes with the maritime operations of a foreign flag vessel" and therefore was not "in commerce" within the meaning of the Act.[26] The Board went on to state that its holding was consistent with the rationale of McCulloch, stating that interference with the affairs of a foreign vessel occurs whenever the dispute is over the composition of a crew. The Board reasoned that determining who would perform the work on board the foreign-

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[22] 245 NLRB 149 (1979).

[23] 46 U.S.C. §1241(b)(1).

[24] National Maritime Union, 245 NLRB at 157.

[25] 285 NLRB 357 (1987).

[26] Id. at 359.

flagged vessel "would necessarily interfere with the on-board operations of the Employer's vessel."[27]

We conclude that the Board's consideration of the activities in the instant case would interfere with the "internal discipline and order" of a foreign-flag vessel. The effect of assertion of jurisdiction would be that the Board would determine to some degree the composition of the crew of a foreign-flagged vessel by considering the legality of the strike and whether the strikers were unlawfully denied reinstatement. As the Board found in Kingcome Navigation, this would "necessarily interfere" with the maritime operations of a foreign flag vessel.[28] And, as in McCulloch, the risk of international discord in this case is particularly high because of the fact that the foreign-flag's law -- here, the Vanuatu Maritime Act -- covers the legality of the conduct involved.[29] Therefore, we find that the Board should not assert jurisdiction in this case.

Accordingly, the assertion of jurisdiction over conduct occurring on the *Hercules* in the instant case is not appropriate. Therefore, we need not decide whether the Employer lawfully refused to reinstate the welders because their work stoppage was mutinous unprotected activity;

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[27] Id.

[28] 285 NLRB at 359.

[29] The Vanuatu Maritime Act, which applies to "every person employed on any ocean going vessel registered under this Act," prohibits strikes or picketing unless: (a) a majority of seamen on the vessel have voted by secret ballot that such action be taken; and (b) at least 30 days written notice is given; and (c) conciliation, mediation and arbitration (as defined by the act) have been completed.

absent withdrawal, the Region should dismiss that allegation as well as the alleged threat of discharge made by a Global foreman to employees aboard the ship.[30]

B.J.K.

[30] I.e., [*FOIA Exemptions 6 and 7(c)*] statement to employees that "if it [were] up to [him], [he] would run every son-of-a-bitch that had a button on off the barge."